

**The Death Penalty in
North Carolina:
Case Law & Statutory Protections**

**Capital Punishment Study Committee
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INTRODUCTION

At its April 26, 2006 meeting, the House Select Committee on Capital Punishment was provided a summary of the trial and state and federal appellate processes in North Carolina death penalty cases. Today's meeting focuses more specifically on the current safeguards in the law, both by case law and statute, which ensure that the death penalty in North Carolina is administered fairly and impartially, without regard to a defendant's or victim's race. First, this presentation will highlight in outline format some of, but certainly not all of the important safeguards which exist to prevent the matter of race from affecting the prosecution and sentencing of North Carolina capital cases. Second, this presentation will provide a brief overview of North Carolina's death row population in terms of racial demographics and statistics.

A. Safeguards Against Race Impacting North Carolina Capital Prosecution and Sentencing

1. Charging decision by District Attorney
 - a. Newly-enacted prosecutorial discretion whether to try a defendant capitally pursuant to N.C. Gen. Stat. § 15A-2004, effective as of July 1, 2001
 - b. Prosecutorial discretion is limited by Constitutional principle under the Equal Protection Clause of the Fourteenth Amendment that prosecution may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *State v. Cherry*, 298 N.C. 86, 103, 257 S.E.2d 551, 562 (1979) (There may be selectivity in prosecutions and that the exercise of this prosecutorial prerogative does not reach constitutional proportion unless there be a showing that the selection was deliberately based upon

"an unjustifiable standard such as race, religion, or other arbitrary classification.") (quoting *Oyler v. Boles*, 368 U.S. at 456), *cert. denied*, 446 U.S. 941 (1980).

c. "In order to prevail on a claim of selective prosecution, the defendant must demonstrate that his prosecution 'was motivated by a discriminatory purpose and had a discriminatory effect.'" *State v. Garner*, 340 N.C. 573, 588, 459 S.E.2d 718, 725 (1995) (citing *Wayte v. United States*, 470 U.S. 598 (1985)), *cert. denied*, 516 U.S. 1129 (1996).

2. Indictment by Grand Jury

a. The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const., Amend. XIV, and N.C. Const., Art. 1, § 19 and § 26 forbid any discrimination in selection of grand jury pursuant to N.C. Gen. Stat. § 15A-622, or in selection of grand jury foreman; members of race may not be systematically excluded from grand jury or grand jury foreman; if defendant establishes *prima facie* case of racial discrimination in selection of grand jury or foreman, then the State may attempt to rebut such a showing by offering evidence that the process used was in fact racially neutral. See *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987).

3. Appointment of two counsel to represent capitally-tried defendants

a. Pursuant to N.C. Gen. Stat. § 7A-450(b1), an indigent capital defendant is afforded the appointment of two appointed attorneys, now qualified under the rules and regulations of the Office of Indigent Defense Services, N.C. Gen. Stat. 7A-498.2.

4. Jury Selection

a. A defendant has “the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded.” *State v. Cornell*, 281 N.C. 20, 32, 187 S.E.2d 768, 775 (1972).

b. If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the United States Constitution requires that a defendant be allowed to question prospective jurors as to such bias. *Ristaino v. Ross*, 424 U.S. 589, 596 (1976).

c. “We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Turner v. Murray*, 476 U.S. 28, 36-37 (1986).

d. Pursuant to N.C. Gen. Stat. § 15A-957, upon motion by the defendant, if the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either transfer the trial to another county in the prosecutorial district, or to another county in an adjoining prosecutorial district, or order a special venire of jurors from another county pursuant to N.C. Gen. Stat. § 15A-958.

e. Pursuant to N.C. Gen. Stat. § 15A-1211, a defendant may challenge the entire jury panel.

f. Pursuant to N.C. Gen. Stat. § 15A-1212, an individual juror may be challenged for cause if he or she is unable to render a fair and impartial verdict.

g. Pursuant to N.C. Gen. Stat. § 15A-1217, in capital cases each

defendant is allowed 14 peremptory challenges, and the State is allowed 14 challenges for each defendant.

h. A defendant may establish a *prima facie* case of discrimination in the prosecutor's exercise of peremptory challenges by showing that he or she is a member of a racial group; that members of that group have been excluded from the jury; and, that the facts and circumstances of the case raise an inference that such exclusion was based upon race. If the *prima facie* case is established, the burden shifts to the State to show a neutral explanation which cannot be done on the mere assumption that the jurors would be partial to the defendant because of their shared race or by affirming the good faith in individual selections. *Batson v. Kentucky*, 476 U.S. 79 (1986), *overruling*, *Swain v. Alabama*, 380 U.S. 202 (1965) (requiring defendant to show prosecutor exercised peremptory challenges against blacks in case after case in order to establish a *prima facie* case of discrimination).

i. The rule of *Batson* prohibiting the exercise of peremptory challenges on the basis of race applies to defendants as well as prosecutors; in other words, a defendant may not exercise his or her peremptory challenges in a discriminatory manner. *Georgia v. McCollum*, 505 U.S. 42 (1992).

j. A defendant has standing to object to the race-based exclusion by peremptory challenges of jurors on equal protection grounds under *Batson* even if he or she is not of the same race as the challenged jurors; in other words, a white defendant may assert the equal protection rights of the excluded black jurors. *Powers v. Ohio*, 499 U.S. 400 (1991).

5. Trial Procedure

a. Pursuant to N.C. Gen. Stat. § 8C-1, Rule 402, only relevant evidence is admissible at trial, and pursuant to N.C. Gen. Stat. § 8C-1, Rule 403, even such relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

b. Pursuant to N.C. Gen. Stat. § 15A-1061, upon motion by a defendant the court must declare a mistrial at any time during the trial “if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant’s case.”

c. The United States Constitution prohibits racially biased prosecutorial arguments. *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

6. Appellate Review on Direct Appeal

a. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(1), a defendant’s death sentence is subject to automatic review by the Supreme Court of North Carolina.

b. Pursuant to N.C. Gen. Stat. § 15A-1442, a defendant may raise on direct appeal to the Supreme Court of North Carolina issues involving racial discrimination, such as discrimination in the prosecutor’s charging decision; discrimination in the selection of the grand jury or grand jury foreman; jury selection and lack of an impartial jury; prejudicial evidence admitted, etc.

c. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(2), the Supreme Court

of North Carolina examines each death sentence on direct appeal for, among other things, whether “the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.”

d. Pursuant to N.C. Gen. Stat. § 15A-2000(d)(2), the Supreme Court of North Carolina also examines each death sentence on direct appeal for whether “the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”

7. Post-Conviction Review

a. Pursuant to either N.C. Gen. Stat. § 15A-1414 or N.C. Gen. Stat. § 15A-1415, after conviction and sentencing a defendant may seek to raise claims by way of a Motion for Appropriate Relief and present evidence that he or she did not receive a fair and impartial trial.

b. If unsuccessful in State courts, the defendant may seek to raise similar claims in federal court by way of a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

B. Overview of North Carolina’s Death Row Population

According to the demographics compiled by the North Carolina Department of Corrections, <http://www.doc.state.nc.us/dop/deathpenalty/deathrow.htm>, there presently are a total of 166 inmates on North Carolina’s death row, including: 62 white males; 2 white females; 88 black males; 1 black female; 8 Indian males; 1 Indian female; and, 4 “other” males. In terms of percentages for North Carolina’s death row population, 39% are white, 54% are black, 5% are Indian, and 2% are other. By comparison, the latest statistical information from the United States Department of Justice’s Bureau of Justice

Statistics (Capital Punishment 2004), indicates that, nationally, at the end of year 2004, of the 3,314 prisoners under sentence of death in the 36 death penalty states and the Federal prison system, 56% were white, 42% were black, and 2% were of other races. <http://www.ojp.usdoj.gov/bjs/abstract/cp04.htm>. Also, for comparison purposes, according to the latest information as of December 31, 2005 for North Carolina's general prison population of 36,620 inmates, 35% were white, 58% were black and 7% were of other races, essentially mirroring the racial statistics for North Carolina's death row. Attachment 1, *Research Bulletin, North Carolina Department of Correction*, Issue No. 49 (Mar. 30, 2006); <http://crrp41.doc.state.nc.us/docs/pubdocs/0006915.PDF>

Since capital punishment was reinstated in North Carolina in 1977 by the enactment of N.C. Gen. Stat. § 15A-2000 and related laws, there have been a total of 43 death row inmates executed in North Carolina within the past 22 years. Of these 43 executed inmates, 28 were white, 13 were black, one was Indian, and one was other race. <http://www.doc.state.nc.us/dop/deathpenalty/executed.htm> In terms of percentages for North Carolina's death row inmates executed since 1977, 66% have been white, 30% have been black, 2% have been Indian, and 2% have been of other race. Attachment 2, *Racial Percentages of North Carolina Death Row Inmates Executed Since 1977*. Of these 28 executed white death row inmates, in 27 of the 28 cases the victims were white; in one case (Kermit Smith, Jr.), the victim was black. Of the 13 executed black death row inmates, in 6 of the 13 cases the victims were white; in the remaining 7 cases the victims were black. In the one case of an executed Indian death row inmate, the victims were also Indian. In the one case of an executed death row inmate designated by the DOC as "other" race (Elias Syriani), the race of the victim

was listed by the DOC as white (the victim was Syriani's estranged wife). Attachment 3,
Percentages of North Carolina Death Row Inmates Executed Since 1977/Race of
Victims.

ATTACHMENT 1

This document provides a quick reference of information from different sources within the North Carolina Department of Correction. Information about the Department and the Divisions can be found on the web site (www.doc.state.nc.us).

	White	Black	Other	Total Percent
Male	39%	18%	2%	59%
Female	20%	20%	1%	41%

Total Authorized Budget Requirements for Fiscal Year 2004-2005:

Excluding Capital Expenditures.....\$1,039,461,373

Cost per day per Probationer/Parolee (FY 2004-2005)		Cost per day per Prison Inmate (FY 2004-2005)	
\$1.93	Regular Supervision	\$74.52	Close Custody
\$12.95	Intensive Supervision	\$68.90	Medium Custody
\$6.71	Electronic House Arrest	\$51.25	Minimum Custody
\$0.72	Community Work Service	\$63.56	Average Cost

Total Supervised as of 12/31/2005				117,886		Entries to Supervision 2005		66,885	
	Probation/Dual	Parole	Post-Release	Entry Type					
	114,438	1,902	1,546	Community	35,619			56%	
Sex				Intermediate	14,617			23%	
Male	77%	94%	93%	DWI Probation	9,276			15%	
Female	23%	6%	7%	Probation (Other)	3,857			6%	
Race				Total Probation	63,369				
White	45%	42%	27%	Parole	990			54%	
Black	46%	53%	66%	DWI Parole	850			46%	
Other	9%	5%	7%	Total Parole	1,840				
				Total Post Release	1,676				

As of 12/31/04 North Carolina ranked 15th in Probation Population, 18th in Probation Supervision Rate (1,737 per 100,000 Population), 33rd in Parole Population, and 47th in Parole Supervision Rate (45 Parolees per 100,000 Population) of the 50 states and the District of Columbia. Bureau of Justice Statistics (2005).

Sanctions	Population as of 12/31/05	Entries to sanction in 2005	Exits from Supervision in 2005						
			Probation		Parole		Post Release		
Intensive Supervision	7,001	14,290	Completions	11,337	18%	1,375	78%	1,246	82%
Spilt Sentence	613	3,493	Supervision Terminated	28,104	45%	298	17%	50	3%
Electronic House Arrest	885	3,023	Incarcerated *	22,910	37%	97	5%	223	15%
Day Reporting Center	828	1,582	Total	62,351		1,770		1,519	
Other Residential	225	300	*(revoked or elect to serve)						
DART-Cherry (90 Day)	198	751							

Drug charges were the most frequent type of crime (22%) committed by new entries to probation in 2005, followed by driving while impaired (15%), assault (12%), and other traffic violations (12%). Nearly half of parole entries during 2005 were driving while impaired (47%). Other crimes were murder (9%), robbery (8%), and drug charges (8%). The most frequent crime category for post-release supervision cases was robbery (29%). Other crimes were assaults (25%), habitual felonies were next frequent (19%) followed by sexual assaults (9%).

North Carolina Department of Correction
Office of Research and Planning
4221 Mail Service Center
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For more information on probation, parole, post-release, and prison populations visit the Research and Planning web page at <http://www.doc.state.nc.us/rap/rapweb/web/index.htm>.

Average Yearly Populations					As of 1/31/2004, North Carolina ranked 12th in Prison Population and 31st for Incarceration Rate of inmates sentenced for more than 1 year (357 Prisoners per 100,000 population) of the 50 states. Bureau of Justice Statistics (2005)	
1991	19,048	1996	30,775	2001		31,885
1992	20,351	1997	32,075	2002		32,982
1993	20,986	1998	32,601	2003		33,646
1994	23,446	1999	31,780	2004		34,988
1995	26,943	2000	31,535	2005		36,263

Prison Population as of 12/31/2005: 36,620				New Admissions in 2005: 26,603			
Sex	<i>Males</i>	33,990	93%	Sex	<i>Males</i>	23,091	87%
	<i>Females</i>	2,630	7%		<i>Females</i>	3,512	13%
Race	<i>White</i>	12,754	35%	Race	<i>White</i>	10,788	41%
	<i>Black</i>	21,392	58%		<i>Black</i>	14,288	54%
	<i>Other</i>	2,474	7%		<i>Other</i>	1,527	5%
Conviction Status				Education Level of Felon Prison Admissions in 2005			
	<i>Felony</i>	34,526	94%	Grade	Highest Grade Claimed	Achieved Reading Grade	
	<i>Misdemeanant</i>	2,083	6%	0-6	1%	30%	
	<i>Missing</i>	11	<1%	6.1-11.9	67%	45%	
				12.0 +	32%	25%	
Age	<i>Adults</i>	34,798	95%	Age	<i>Adults</i>	23,904	90%
	<i>Youths 18 to 20</i>	1,653	5%		<i>Youths 18 to 20</i>	2,279	9%
	<i>Youths <18</i>	169	<1%		<i>Youths <18</i>	420	1%
Program Assignments				Most Frequent Crimes of 2005 Admittants			
		<i>Full Time</i>	<i>Part Time</i>	Drugs Possession/ Sell (or intent)	5,267	20%	
	Admission Processing	1,980	0	Assault	3,053	11%	
	Academic Education	1,937	1,760	Larceny	2,889	11%	
	Vocational Education	1,597	451	DWI	2,583	10%	
	Institutional Life	1,279	102	Breaking and Entering	2,570	10%	
	Health Maintenance	1,086	141	Traffic Violations	1,649	6%	
	Drug/Alcohol Programs	951	8,310	Robbery	1,344	5%	
	Social Skills Development	152	2,676	Sexual Assault/Sex Offense	1,222	5%	
	Personal Growth/Religious Activities	61	2,108	Fraud	1,145	4%	
	Family Oriented Programs	0	384	Drug Trafficking	764	3%	
Work Assignments				Murder/Manslaughter	694	3%	
	Unit Services	5,387		Habitual Felon	608	2%	
	Food Services	3,399		Forgery	531	2%	
	Road Squads	2,214		Possession of Firearm/Weapon	457	2%	
	Enterprise	1,866		Burglary	276	1%	
	Maintenance	1,658		Kidnapping & Abduction	266	1%	
	Work Release	1,090		Other Crimes	1,285	4%	
	Community Work Crew	906					
	State Agency	380		Median Percent of Sentences Served			
	Local Government	315			<i>Structured</i>	<i>Pre-Structured</i>	
	Construction	236		Felon	108%	58%	
	Other Job	1,209		Misdemeanant	95%	45%	

PRISON FACILITIES as of 12/31/2005

Half-way House:	1
Substance Abuse Facilities:	2
Prisons:	76
Total	79

Standard (SOC) and Expanded (EOC) Operating Capacities:

	<u># of Units</u>	<u>SOC</u>	<u>EOC</u>
Close	17	12,274	14,725
Medium	22	10,684	13,200
Minimum	37	8,316	10,403
Total:		31,274	38,328

Largest:	NC Correctional Institution for Women	Capacity of	<u>SOC</u>	<u>EOC</u>
			956	1,362
Smallest:	Wilmington RFW	Capacity of	26	36

Department of Correction Facility Construction

Facilities Completed in 2005:
None

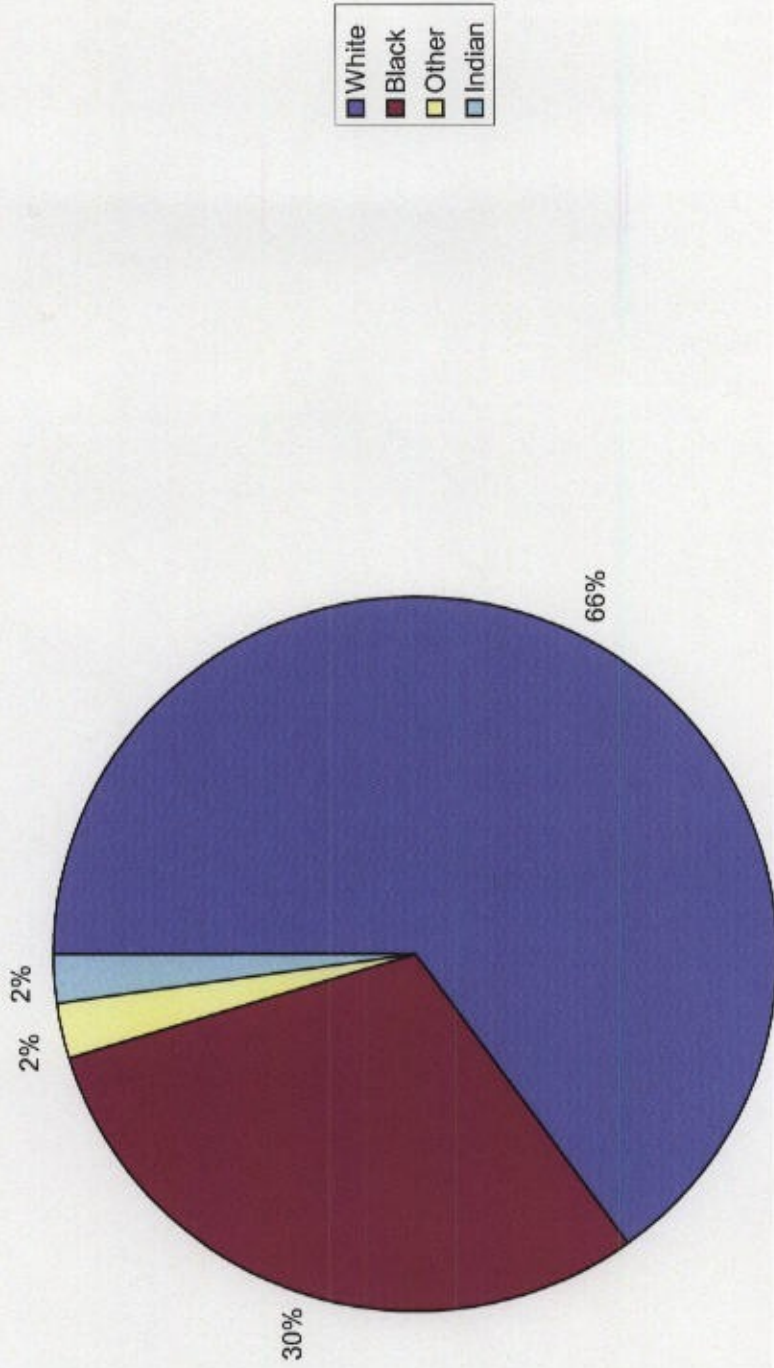
Facilities to be Completed in 2006:

<u>Prison Unit</u>	<u>Custody Level</u>	<u>Number of Beds</u>	<u>Construction Costs</u>
Maury Correctional Institution	Close	1,000	\$78,200,000
Bertie Correctional Institution	Close	1,000	\$80,500,000

ATTACHMENT 2

Racial Percentages of North Carolina Death Row Inmates Executed Since 1977

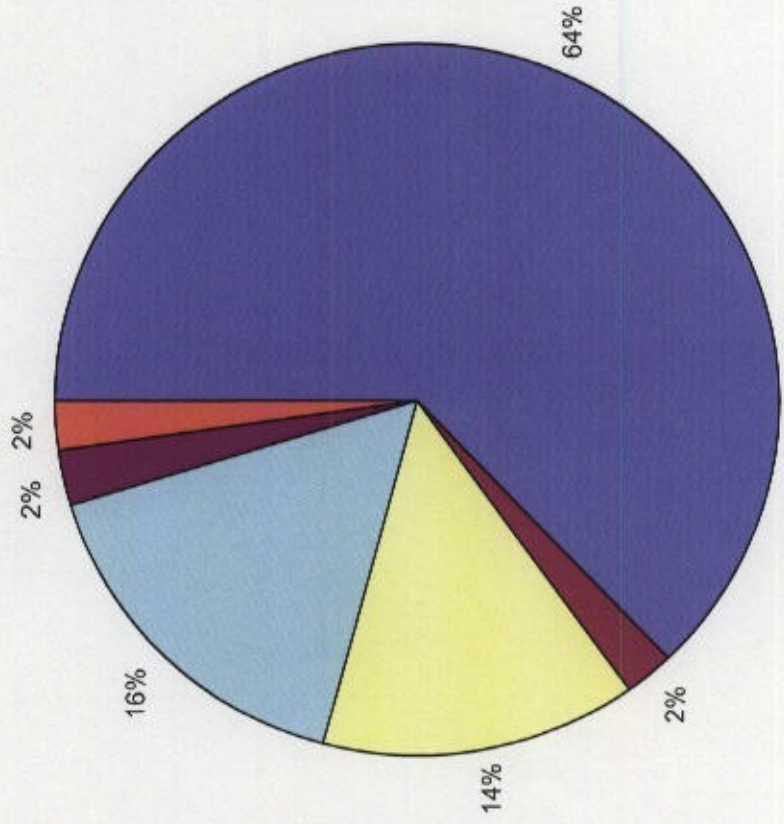
(Source: NC Department of Justice September 2006)



ATTACHMENT 3

Percentages of North Carolina Death Row Inmates Executed Since 1977/Race of Victims

(Source: NC Department of Justice September 2006)



- White Defendant/White Victim
- White Defendant/Black Victim
- Black Defendant/White Victim
- Black Defendant/Black Victim
- Indian Defendant/Indian Victim
- Other Defendant/Other Victim